

1 The Honorable Michelle L. Peterson
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, a Washington
non-profit corporation,

Plaintiff,

v.

BARRY THOM, in his official capacity as
Regional Administrator of the National Marine
Fisheries Service; CHRIS OLIVER, in his
official capacity as the Assistant Administrator
for Fisheries of the National Marine Fisheries
Service; NATIONAL MARINE FISHERIES
SERVICE; WILBUR ROSS, JR., in his official
capacity as Secretary of the United States
Department of Commerce; and UNITED
STATES DEPARTMENT OF COMMERCE,

Defendants.

and

ALASKA TROLLERS ASSOCIATION,

Intervenor-Defendant.

No. 2:20-cv-0417-MLP

**INTERVENOR-DEFENDANT ALASKA
TROLLERS ASSOCIATION'S ANSWER
TO PLAINTIFF'S COMPLAINT**

Intervenor-Defendant Alaska Trollers Association (hereinafter "Intervenor") hereby answers Plaintiff's Complaint ("Complaint") (Dkt. 1) filed on March 18, 2020, as set forth below:

I. INTRODUCTION

1. Admit, but 1995 was the year of the highest recorded population of Southern Resident Killer Whales (SRKW) since 1977 when regular counts began. The population then

1 declined, but it has remained steady for many years and most recent data shows a slowly
2 increasing population.

3 2. In response to paragraphs 2 through 4 of the Complaint, inclusive, Intervenor has
4 insufficient information and knowledge with which to form a belief regarding individual past
5 members of the Southern Resident Killer Whales (SRKW) and therefore denies those
6 allegations. Intervenor admits that the availability of salmon in some areas of the SRKW range
7 may be one of the many factors affecting these whales, depending upon where they are and at
8 what times. The balance of paragraphs 2-4 contain conclusory statements and qualitative
9 assessments, which Intervenor disputes or has insufficient knowledge and information with
10 which to form a belief and therefore denies those allegations. There is considerable debate in the
11 scientific literature over which factors "most affect" and have "reproductive success" for the
12 SRKW population. For instance, several studies note that whales in this population have
13 bioaccumulated extremely large amounts of PCBs and other contaminants and toxins within their
14 bodies that directly and adversely affect reproductive success. Other studies note that this
15 SRKW population has declined since its peak as a result of the cumulative (and often
16 synergistic) effects of multiple factors, not one of which is necessarily determinative and which
17 operates over both short- and long-term timeframes, not the least of which was the capture/death
18 of approximately 275 SRKW in the 1960s and 1970s. Other studies suggest there is a lack of
19 female SRKWs and too much marine mammal competition for Chinook from other marine
20 mammal populations including seals, Northern Resident Killer Whales and Stellar Sea Lions.
21 Intervenor denies there is a correlation between Chinook abundance and the SRKW population.

22 3. In response to paragraph 5 of the Complaint, Intervenor believes that the
23 allegations made in the first two sentences are generally correct, but denies the remainder of the
24 paragraph. Plaintiff, however, omits the fact that the fishery management process for salmon is
25 conducted on an annual cycle basis and uses, and has used, the best available scientific
26 information each year to assess and manage the fisheries within its jurisdiction, including

1 annually assessing and mitigating the impacts of those fisheries on SRKW and other ESA-listed
2 marine species. Intervenor denies that the Pacific Salmon Treaty actually sets an upper limit on
3 harvest.

4 4. Intervenor admits paragraph 6.

5 5. Intervenor denies paragraph 7. The allegations made are merely conclusory
6 characterizations of Plaintiff's arguments that are based upon Plaintiff's prior conclusory
7 statements, summaries or conclusions of law, none of which have yet been proven. Intervenor
8 disputes that the closure of the troll salmon fishery conducted in the exclusive economic zone
9 (EEZ) of southeast Alaska will contribute to recovery of the Chinook salmon evolutionary
10 significant units that are listed as threatened under the ESA. Chinook salmon migrate in the
11 millions throughout thousands of miles of ocean coastline, in multiple regions, although they
12 spend the vast majority of their life span in Alaska waters. The relatively small number of
13 Chinook salmon commercially harvested in the EEZ of southeast Alaska bears little to no
14 relationship to the number of Chinook salmon listed under the ESA, especially for Puget Sound
15 salmon.

16 6. Paragraph 8 of the Complaint contains allegations that purport to be statements
17 from the 2019 SEAK Biological Opinion (BiOp). The actual BiOp speaks for itself and requires
18 no response. Intervenor denies that the harvest of Chinook salmon in the southeast Alaska troll
19 fishery contributed to any problem with SRKW growth rates. Further, characterizations of
20 statements made within the 2019 SEAK BiOp are taken out of context and are misleading or
21 constitute conclusions of law, none of which have, as yet, been proven. Intervenor therefore
22 denies those allegations.

23 7. Intervenor denies paragraphs 9-13 of the Complaint.

24 **II. PARTIES**

25 8. Paragraphs 14-19 contain allegations about Plaintiff Wild Fish Conservancy and
26 its members. Intervenor has insufficient knowledge and information with which to form a belief

1 and therefore denies those allegations.

2 9. Paragraphs 20-24 are allegations concerning the identity of the Defendants and
3 their respective roles and responsibilities concerning fisheries management and duties. To the
4 extent those allegations contain conclusions of law, no response is required. Any allegations that
5 are not conclusions of law appear to be generally correct and are admitted.

6 **III. JURISDICTION AND VENUE**

7 10. Paragraphs 25 and 26 of the Complaint contain allegations to which no response
8 is required because the allegations purport to be statements, summaries, or conclusions of law, or
9 characterizations of Plaintiff's legal contentions and are denied on that basis.

10 11. Paragraph 27's conclusory statements and facts concerning Defendant's actions
11 are denied. Further, Intervenor denies that the Western District of Washington is the most
12 appropriate venue for this action.

13 **IV. FACTS**

14 12. Paragraphs 28-63 purport to be statements of provisions of the Endangered
15 Species Act (ESA), the National Environmental Policy Act (NEPA), the Magnuson-Stevens Act
16 and the Administrative Procedure Act (APA), as well as statements about certain provisions of
17 either applicable statutes within those Acts or regulations adopted under the Acts or from
18 decisions that have interpreted them from various courts. As they are all conclusions of law, no
19 response to these allegations is required. Further, because the allegations are incomplete; i.e.,
20 they do not set forth all of the provisions of the various federal Acts, regulations or cited cases,
21 they are necessarily selective and misleading insofar as they imply or suggest that there are no
22 other provisions in the law, regulations, or case law that further elaborate upon, supplement,
23 modify or even contravene allegations made and for that reason as well they are denied.

24 13. Intervenor admits paragraphs 64 and 65.

25 14. Paragraph 66 appears to accurately state what is generally known about the
26 historic migratory patterns of the SRKW, but Intervenor has insufficient knowledge and

1 information upon which to form a belief as to whether the allegations made remain factually
2 accurate or have been scientifically proven to be true or may have changed. Intervenor therefore
3 denies paragraph 66.

4 15. Paragraph 67 is a partial characterization of the 2008 ESA Recovery Plan for
5 SRKW, but because the characterizations made are selective and incomplete, the characterization
6 of the Plan generally is misleading and is therefore denied.

7 16. Intervenor admits the first sentence of paragraph 68, but has insufficient
8 knowledge or information upon which to form a belief and therefore denies the remaining two
9 sentences, especially since they are conclusory and argumentative.

10 17. Paragraph 69 is argumentative and contains allegations about the responsibilities
11 and actions of NMFS and other federal agencies and is therefore denied.

12 18. Intervenor admits that the various populations of killer whales, including the
13 southern resident population, have distinctive characteristics, but otherwise denies paragraph 70.

14 19. Intervenor denies paragraphs 71, 72, and 73, especially to the extent that
15 allegations made in those paragraphs are intended to suggest that all scientists who have
16 participated in studies of the SRKW or any aspect of its life cycle, status, and health are in
17 agreement. They are not.

18 20. Intervenor admits that Chinook salmon are the largest Pacific salmon, but
19 otherwise denies paragraph 74.

20 21. Intervenor admits paragraphs 75-79 and 82. Intervenor has insufficient
21 information and knowledge upon which to form a belief and therefore denies paragraphs 80 and
22 81.

23 22. Intervenor denies paragraph 83.

24 23. Paragraphs 84 is a conclusion of law relating to the 2018 Fishery Management
25 Plan and the Pacific Salmon Treaty to which no response is required.

26 24. Intervenor denies paragraph 85-87.

1 25. Intervenor admits paragraphs 88-89.

2 26. Intervenor admits paragraph 90.

3 27. Intervenor admits the first sentence of paragraph 91, but denies the remainder of
4 paragraph 91.

5 28. Paragraph 92 is argumentative, false in part, selective in its allegations,
6 conclusory and misleading. Intervenor accordingly denies paragraph 92.

7 29. Intervenor denies paragraph 93.

8 30. Intervenor admits that the 2019 SEAK BiOp and incidental take statement
9 authorizes incidental take of some ESA listed species from fisheries in the EEZ of southeast
10 Alaska. Except as so admitted, paragraph 94 is denied.

11 31. Intervenor denies paragraph 95.

12 32. Paragraphs 96, 97, and 98 are conclusory and selective characterizations of the
13 2019 SEAK BiOp. They are misleading and are therefore denied.

14 33. Intervenor denies paragraphs 99-108.

15 34. Intervenor admits the first two sentences of paragraph 109, but has insufficient
16 knowledge or information upon which to form a belief and therefore denies the remainder of
17 paragraph 109.

18 35. Intervenor denies paragraphs 110-112.

19 36. Intervenor has insufficient knowledge or information upon which to form a belief
20 and therefore denies paragraph 113.

21 37. Intervenor denies paragraphs 114-119 of Plaintiff's Complaint.

22 38. In the remaining allegations of the Complaint, Plaintiff sets forth its prayer for
23 relief to which no response is required. However, Intervenor denies that any of the requested
24 relief would redress the alleged harms complained of by Plaintiff.

25 39. Defendants and other government agencies in the US and Canada and other
26 persons and entities are actively engaged in pursuing measures to preserve, protect and enhance

1 the existing SRKW population. Any court-ordered additional mitigation matters would be
2 counterproductive and inflict severe economic suffering and job losses on southeast Alaska
3 coastal fishing families and the communities in which they live far out of proportion to any
4 conservation benefits for SRKW population that a widespread fishery closure in southeast
5 Alaska would provide. The balance of harms would certainly not favor such an injunction. Both
6 Washington state and British Columbia, where the SRKW population feeds part of each year,
7 have already taken major steps to protect SRKW habitat and to provide additional Chinook
8 salmon through special hatchery and outplanting programs, which will benefit the SRKW
9 population. Additional actions have been recently legislated in Washington State to reduce
10 vessel noise and other sources of noise pollution on SRKW, as well as to reduce the amount of
11 pollutants the SRKW population is exposed to, both factors that cannot be addressed through
12 fisheries management alone. In short, multiple actions to benefit SRKW and to improve their
13 chances of survival are already being undertaken, with far better long-term results likely to be
14 achieved from these actions than any reductions in the southeast Alaska troll fishery could
15 provide.

16 **AFFIRMATIVE DEFENSES**

17 1. Plaintiff's claims are barred based upon lack of subject matter jurisdiction.
18 2. Plaintiff's claims are barred for failure to allege sufficient facts and state claims
19 upon which relief can be granted.
20 3. Venue is improper.
21 4. Plaintiff's claims are barred because Plaintiff has failed to join parties under Rule
22 19.
23 5. Plaintiff lacks standing.

24 WHEREFORE, Defendant-Intervenor Alaska Trollers Association prays for judgment
25 against the Plaintiff and for its costs and disbursements incurred herein and for such other and
26 ///

1 further relief as the Court deems just and equitable.

2 Dated this 28th day of April 2020.

3 s/ Thane W. Tienson

4 Thane W. Tienson, WSBA #13310

5 Email: ttienson@lbblawyers.com

6 *Attorneys for Intervenor-Defendant*
7 *Alaska Trollers Association*

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2020, I served the foregoing INTERVENOR-DEFENDANT ALASKA TROLLERS ASSOCIATION'S ANSWER TO PLAINTIFF'S COMPLAINT on the following individual(s):

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- by the Court's CM/ECF system to the email addresses listed above
- by facsimile pursuant to the fax numbers listed above
- by email to the email addresses listed above
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s/ Kathy Baker

Kathy Baker, Legal Assistant to Thane W. Tienson
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Trollers Association